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No. 95-402

IN THE

United States Supreme Court

OCTOBER TERM, 1995

G.K.A. BEVERAGE CORP., STATEN ISLAND BEVERAGE CORP., CLOVER BEVERAGE DIST. CORP., PRINCE BEVERAGE DIST. CORPORATION, GICCI BEVERAGE CORPORATION, V. IOCOLANO DISTRIBUTION CORPORATION, R-KET CORPORATION, P. LAUTAO CORPORATION, VIN-MARE DISTRIBUTION CORPORATION, MANUEL NIEVES LIMITED, VINCENT LAUTATO CORPORATION, ROCKVILLE DISTRIBUTION CORPORATION, LYNVEY BEVERAGE CORPORATION, PA DISTRIBUTION CORPORATION, STARLITE BEVERAGE CORPORATION, 396 6TH AVENUE SYSTEMS CORP., RAPITZ BEVERAGE CORPORATION, RINDA BEVERAGE CORPORATION,R&E WOLDERICH CORPORATION, WINDY HILLS CORPORATION, VICTORY HEIGHTS CORPORATION,

(For Continuation of Caption See Reverse Side of Cover)

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT HAROLD HONICKMAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

DOMINO BEVERAGE CORPORATION, WESTERLEIGH BEVERAGE CORPORATION, QUINCO BEVERAGE CORPORATION, RODAN BEVERAGE CORPORATION, KARE-FRE BEVERAGE CORPORATION, BY SUM BEVERAGE CORPORATION, BREIT DISTRIBUTION CORPORATION, TITAN BEVERAGE CORPORATION, LUNDON BEVERAGE DISTRIBUTION CORPORATION, EL-LEN BEVERAGE CORPORATION, SCOGNAMIGLIO BEVERAGE CORPORATION, JOSEPH CAUCIELLA, INC., BREITINGER DISTRIBUTION CORPORATION, FILMAR DISTRIBUTION LIMITED, J. MULVEY DISTRIBUTION CORPORATION, R.A.E. BEVERAGE CORPORATION, THREE GUYS DISTRIBUTION CORPORATION, KENNETH STEFFENS CORPORATION, JOHN BOEHLER CORPORATION, ROE BEVERAGE CORPORATION, DELTA SIGMA CORPORATION, MOE'S BEVERAGE CORPORATION, BARBARO 7UP DISTRIBUTION CORPORATION, GUMBY BEVERAGE CORPORATION, BIG DAN'S BEVERAGE CORPORATION, BALLATO BEVERAGE CORPORATION, JPM BEVERAGE CORPORATION, MILLER BEVERAGE CORPORATION, MATTY CASAMASSINA CORPORATION, DEL BEVERAGE CORPORATION, JERIJO CORPORATION, K&M BEVERAGE DISTRIBUTION CORPORATION, ACE METRO BEVERAGE CORPORATION, DAY LAYT DISTRIBUTION CORPORATION, FRANK MACCORONE CORPORATION, JENTINE BEVERAGE CORPORATION, F.C.L. BEVERAGE CORPORATION, TWIN EAST BEVERAGE CORPORATION, EUGENE & MICHAEL PARINE CORPORATION, ORLINO BEVERAGE CORPORATION, LAR-TIS LTD. CORP., JAMES QUARTARARO CORPORATION, QUALITY BEVERAGE CORPORATION, M&A TISBO LIMITED, G&C FAVA CORPORATION, P.A.L. BEVERAGE CORPORATION, ALBANESE BEVERAGE CORPORATION, ROSARIO PANEBIANCO, FRANK SCARANO, JOE DECOSTANZO, FRANK GRASSO, JERRY BILOTTI, ROBERT RICH, RAYMOND LEVASSEUR, MIKE CHRISTINA, LINDA VITIELLO, LILLIAN BAGIELTO, ANTOINETTE M. GAMBINO, WILLIAM ROTTKAMP,RICHARD E. MISKOVSKY, NORMAN WALMSLEY, CONRAD PANZA, NICHOLAS J. FORTUNA, FREDERICK J. LUDWIG, MICHAEL HUBBARD, JACK QUARTARARO, MARY ELLEN TAFFO and BART SIMONE,

Petitioners,

-against-

HAROLD HONICKMAN, DR PEPPER SEVEN-UP COMPANIES INC., DR PEPPER/SEVEN-UP CORPORATION and LANCE T. FUNSTON,

Respondents.

QUESTIONS PRESENTED

1. In the face of numerous federal court decisions consistently holding that distributors of an acquired company that are terminated following an acquisition lack standing to challenge the acquisition on antitrust grounds, did the Court of Appeals properly affirm the dismissal of petitioner-distributors' antitrust claims for lack of antitrust standing?

2. In the face of petitioners' active participation as a party to the bankruptcy proceedings at which respondents' acquisition was approved by the Bankruptcy Court, petitioners' assertion of the same arguments in the bankruptcy proceeding as form the basis for their complaint in this collateral action, petitioners' failure to appeal the Bankruptcy Court's approval of respondents' acquisition in bankruptcy, and several federal court decisions consistently holding that subsequent challenges to an acquisition in bankruptcy are barred by the doctrine of *res judicata*, was petitioners' collateral attack on respondents' acquisition properly dismissed as barred by the doctrine of *res judicata*?

3. In the face of petitioners' failure to allege that respondents had the requisite intent to procure the breach of petitioners' distribution contracts and their inability to allege that respondents' conduct proximately caused the breach of those contracts, did the Court of Appeals properly affirm the dismissal of petitioners' state law claim for intentional interference with contractual relations?

4. In the face of petitioners' failure to allege that respondents made any contact whatsoever with petitioners' present or prospective retailer customers, did the Court of Appeals properly affirm the dismissal of petitioners' state law claim for intentional interference with prospective contractual relations?

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STATUTES INVOLVED

The text and citation of applicable statutes, in addition to those set forth in the Petition, are set forth in the appendix hereto.

STATEMENT OF THE CASE

Petitioners, eighty-nine former distributors of the now-defunct Seven-Up Brooklyn Bottling Company, Inc. ("Seven-Up Brooklyn"), have requested this Court to review the Court of Appeals' decision affirming the District Court's grant of the motions of respondents Harold Honickman ("Honickman"), Dr Pepper Seven-Up Companies, Inc. and Dr Pepper/Seven-Up Corporation (collectively "DPSU"), and Lance T. Funston ("Funston") to dismiss petitioners' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the decisions of the District Court and the Court of Appeals were correct and consistent with a large body of case law in the areas of antitrust standing, *res judicata* and tortious interference with present and prospective contractual relations. There is no special or important reason for this Court to exercise its judicial discretion to review the decision below. Accordingly, the petition for a writ of certiorari should be denied.

A. *Nature Of The Case*

Petitioners' claims in this case flow directly from the bankruptcy and ultimate dissolution of Seven-Up Brooklyn in early 1991. In October 1990, allegedly as a result of conduct by respondents Honickman and Funston, Seven-Up Brooklyn filed a petition for Chapter 11 bankruptcy reorganization in the United States Bankruptcy Court in the Eastern District of New York. The petition was assigned to Bankruptcy Judge Cecelia H. Goetz. On October 18, 1990, with the consent of Seven-Up Brooklyn's two secured creditors, Judge Goetz granted Seven-Up Brooklyn's

motion for use of cash collateral pending reorganization.[1] This authorization permitted Seven-Up Brooklyn to continue to operate while it attempted to work out a plan of reorganization that would satisfy all of its creditors, including petitioners. (Petition App. 21)

On February 27, 1991, a hearing was held to consider the sale of Seven-Up Brooklyn's assets. At the hearing, two bid proposals for the company's assets were presented to the Bankruptcy Court. The first, a joint bid by respondents Honickman and DPSU, proposed that Honickman would purchase Seven-Up Brooklyn's existing inventory and a division of DPSU would purchase Seven-Up Brooklyn's remaining non-cola franchise assets, which it would in turn transfer to Honickman. The joint DPSU/Honickman proposal did not envision the continued operation of Seven-Up Bottling as a distinct entity and was conditioned upon Honickman's receiving the approval of the Federal Trade Commission ("FTC"). The joint proposal had the support of the debtor, the two secured creditors, the unsecured creditors committee, DPSU and most, if not all, of Seven-Up Brooklyn's other franchisors. (Petition App. 22-23)

By contrast, the second proposal, by Kraus Industries, contemplated the continued operation of Seven-Up Brooklyn as a bottler of soft drinks, but did not provide sufficient funds to satisfy the company's obligations to its junior secured creditor, the franchisors, all of whom refused to consent to a reduction in their amounts, or the unsecured creditors. Because the Kraus Industries proposal contemplated the continued operation of Seven-Up Brooklyn as a going concern, and thus would permit petitioners to

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[1] The Bankruptcy Court proceedings, *In the Matter of Seven-Up Brooklyn Bottling Co.*, No. 090-71516 (11) (E.D.N.Y.), are a matter of public record, of which the District Court and the Court of Appeals were permitted to take judicial notice. *See, e.g., Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 872 (2d Cir. 1991).

continue to act as distributors for that bottler, petitioners supported the Kraus Industries proposal. (Petition App. 23)

Petitioners appeared at the February 27, 1991 Bankruptcy Court hearing and opposed the DPSU/Honickman proposal in favor of the Kraus Industries offer. Petitioners alleged at the hearing, just as they asserted in the instant complaint, that respondents had somehow conspired to chill the bidding for Seven-Up Brooklyn and that the DPSU/Honickman proposal was part of a scheme to defraud petitioners and to obtain market power in the New York "carbonated soft drinks" market. At the conclusion of the hearing, Judge Goetz rejected both proposals and terminated Seven-Up Brooklyn's authority to use cash collateral. Judge Goetz based her rejection of the DPSU/Honickman proposal in large part on petitioners' allegations at the hearing that respondents had improperly chilled the bidding process, and her concern that the FTC might not approve the transaction. (Petition App. 24-25)

Nonetheless, at another hearing one week later, on March 5, 1991, the Bankruptcy Court reconsidered its rejection of the two proposals. After a revised Kraus Industries proposal was rejected by the debtor, the secured and unsecured creditors and some of the franchisors, the Bankruptcy Court found the revised Kraus Industries proposal inadequate and Kraus Industries withdrew it. (Petition App. 25) Petitioners then successfully urged the Bankruptcy Court to require Honickman to modify the DPSU/Honickman proposal by including as part of that proposal Honickman's offer of sixty distributor jobs for which petitioners would be given first priority. Honickman agreed to that demand and, thereafter, with the support of the debtor, the secured creditors, and the unsecured creditors committee, and without any continued objection by petitioners, the Bankruptcy Court approved the modified DPSU/Honickman proposal.

On February 12, 1991, Honickman and DPSU began the process of obtaining the FTC's approval of the proposed acquisi-

tion. On October 3, 1991, the FTC denied Honickman's application to acquire the Seven-Up Brooklyn assets. Thereafter, Honickman and DPSU commenced litigation against the FTC challenging its denial of prior approval. (Petition App. 26) Ultimately, on January 31, 1994, the FTC entered into a stipulation, which was approved by the United States District Court for the District of Columbia on February 3, 1994, expressly granting Honickman approval to acquire the rights to produce and distribute the soft drink products previously produced and distributed by Seven-Up Brooklyn. *Dr Pepper/Seven-Up Companies, Inc., v. Federal Trade Comm'n*, Civil Action No. 91-2712 (JLG) (D.D.C. February 3, 1994).

On May 2, 1991, the Bankruptcy Court entered its order approving the sale of Seven-Up Brooklyn's non-cola bottling assets to DPSU and Honickman. (Petition App. 26) Petitioners neither appealed the Bankruptcy Court's order approving the sale nor moved to have that order vacated pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Rather, on May 18, 1993, more than two years after the Bankruptcy Court entered its order approving the sale, petitioners filed their complaint in this matter. The allegations in that complaint constituted nothing more than a thinly veiled collateral attack on the 1991 order of the Bankruptcy Court. In essence, petitioners' allegations in this case, like their arguments in the bankruptcy proceedings, challenged respondent Honickman's acquisition of Seven-Up Brooklyn's assets as constituting both a violation of federal and state antitrust laws and an intentional interference with petitioners' present and prospective contractual relations.

B. *Procedural History*

On February 7, 1994, the United States District Court for the Eastern District of New York (Glasser, J.) granted respondents' motion to dismiss on the grounds that: (i) the complaint was barred by the doctrine of *res judicata* (Petition App. 29-34); (ii) petition-

ers could not allege antitrust injury sufficient to confer standing to maintain their antitrust claims (Petition App. 34-39); (iii) petitioners could not allege that respondents' conduct proximately caused Seven-Up Brooklyn to breach its distribution contracts (Petition App. 42-45); and (iv) petitioners could not allege that respondents had taken any action with respect to any third parties with whom petitioners claimed to have had prospective business relations (Petition App. 45-47).

On June 1, 1995, the United States Court of Appeals for the Second Circuit (55 F.3d 762 (2d Cir. 1995)) affirmed the District Court's dismissal of the antitrust claims on the ground that petitioners lack antitrust standing to maintain those claims. (Petition App. 10-12) The Court of Appeals also affirmed the District Court's dismissal of the tortious interference claims on the grounds that petitioners could not allege that respondents had either (i) acted with the requisite intent with regard to procuring the breach of Seven-Up Brooklyn's distribution contracts (Petition App. 14) or (ii) intentionally caused soft drink retailers not to enter into contractual relations with petitioners (Petition App. 14-15).

SUMMARY OF ARGUMENT

The Court of Appeals decision in this case is unremarkable in its consistency with a long line of federal court cases unanimously holding that those in a contractual relationship with an acquired company cannot allege antitrust injury sufficient to confer antitrust standing when, following the allegedly anticompetitive acquisition, their contractual relationships with the acquired company are terminated. Despite their bald assertion to the contrary, petitioners do not, and indeed cannot, distinguish this case from what petitioners refer to as "the 'run of the mill' cases cited by the courts below . . . which stand for the proposition that mere distributors lack direct injury when a supplier is injured and

hence do not enjoy standing to invoke the antitrust laws." (Petition at 4)

As petitioners themselves concede, they were "equity distributors" (Petition at 5) whose contractual distributor relationships with Seven-Up Brooklyn were terminated upon the Bankruptcy Court's approval of the sale of Seven-Up Brooklyn's assets to Honickman and DPSU. Petitioners were no more "inextricably intertwined" with the soft drink products they distributed than any other distributor that is terminated following an acquisition of its supplier. As terminated distributors of an acquired company, petitioners simply lack antitrust injury sufficient to confer standing to pursue an antitrust challenge to the acquisition.

Although the Court of Appeals did not rely upon the doctrine of *res judicata* when it affirmed the District Court's dismissal of the petitioners' complaint, the doctrine provides an independently sound basis for denying the petition for the writ of certiorari. The petition gives short shrift to the bankruptcy proceedings that resulted in approval of Honickman's offer to purchase the Seven-Up Brooklyn assets and the termination of petitioners' distributorships. Nevertheless, as the District Court fully recognized, petitioners were represented at, and participated fully in, those proceedings, opposing Honickman's bid proposal in favor of a competing proposal. If petitioners were dissatisfied with the Bankruptcy Court's approval of the sale of the assets to Honickman, their sole recourse was through the appeal of that approval. The District Court below properly determined that, having failed timely to appeal the Bankruptcy Court's approval order, petitioners were barred by the doctrine of *res judicata* from collaterally attacking the approval order in a subsequent lawsuit.

Lastly, the Court of Appeals' affirmance of the District Court's dismissal of petitioners' state law tortious interference claims was entirely proper and consistent with all relevant case law. Petitioners' failure to allege that respondents had the requisite

intent to procure the breach of petitioners' distribution contracts and their inability to allege that respondents' conduct proximately caused the breach of those contracts were fatal to petitioners' claim for intentional interference with contractual relations. Furthermore, petitioners' failure to allege that respondents made any contact whatsoever with petitioners' present or prospective retailer customers mandated the dismissal of petitioners' claim for intentional interference with prospective contractual relations.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONERS LACKED ANTITRUST STANDING

Both the District Court and the Court of Appeals correctly held that petitioners' antitrust claims were fatally defective because petitioners could not allege antitrust injury, and thus lacked standing to maintain their antitrust claims. To have standing to assert an antitrust claim, a plaintiff must allege "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original). The Court of Appeals properly recognized that, under this Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986), a showing of antitrust injury is necessary, though not sufficient, to establish antitrust standing.[2]

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[2] As Judge Posner explained in *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984):

(continued...)

Courts have consistently held that distributors of an acquired company that are terminated following an acquisition lack standing to challenge the acquisition on antitrust grounds. In *A.G.S. Electronics, Ltd. v. B.S.R. (USA), Ltd.*, 460 F. Supp. 707 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978), for example, the defendant manufacturer of "low end" record players acquired the only other manufacturer of such equipment. Following the acquisition, the defendant terminated the acquired firm's distributor in favor of its own distributor. Precisely like petitioners, the terminated distributor alleged that the defendant's conduct "constituted an attempt to monopolize or a conspiracy to monopolize the market for the sale *and distribution* of record changers or low-end record players in the United States in violation of § 2 of the Sherman Act." 460 F. Supp. at 709 (emphasis added). The court properly dismissed the terminated distributor's antitrust challenge, holding that:

> [T]he only injuries of which AGS complains -- the loss of profits, promotional expenses and capital expenditures -- all flow from the termination of its distributorship rather than from any

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[2](...continued)

> There is nothing esoteric about the *Brunswick* rule. It is the application to antitrust law of venerable principles of tort causation illustrated by *Gorris v. Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable. Similarly, although the plaintiff in *Brunswick* would not have been hurt if there had been no acquisition, the acquisition did not hurt it in the way that the framersof the antitrust laws had in mind.
>
> *Id.* at 708-09.

> anticompetitive effects of the defendants' acquisition of Glenburn. As such, AGS has failed to allege a causal connection between its injury and the allegedly unlawful acquisition.

Id. at 710.[3]

Similarly, courts have regularly held that those in a business relationship with a firm whose financial demise is arguably the result of an antitrust violation lack standing to sue under the antitrust laws for the derivative or incidental injury to their business relationship. For example, in *Lovett v. General Motors Corp.*, 975 F.2d 518 (8th Cir. 1992), the court affirmed the dismissal of the antitrust complaint of the owner of an automobile distributorship that had filed a petition in bankruptcy after General Motors allegedly conspired with another distributor to restrict the distribution of vehicles to the distributorship owned by the plaintiff. The court explained that:

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[3] *Accord John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 500 (9th Cir. 1977) (allegation that "because Olympia purchased the Hamm's brand, Lenore was replaced in favor of other distributors" was insufficient to allege antitrust injury); *Volmar Distributors, Inc. v. The New York Post Co.*, 825 F. Supp. 1153, 1159-61 (S.D.N.Y. 1993) (allegation of independent distributorship termination in favor of other distributors in order "to drive plaintiffs out of the relevant market" was insufficient to allege antitrust injury); *Saltz & Sons, Inc. v. Hart Schaffner & Marx*, 1985-2 Trade Cas. (CCH) ¶ 66,768 at 63,723 (S.D.N.Y. 1985) (allegation of termination of supplier contract following acquisition was insufficient to allege antitrust injury); *Jarmatt Truck Leasing Corp. v. Brooklyn Pie Co.*, 525 F. Supp. 749, 750 (E.D.N.Y. 1981) (allegation that defendants "conspired to deny Jarmatt the right to distribute Mrs. Smith's pies in order to 'restrict, stifle and destroy competition' and to 'monopolize the distribution of Mrs. Smith's pies and Benchmark's products'" were insufficient to state a claim under antitrust laws); *Fisher v. Coca-Cola Bottling Co. of Los Angeles*, 1979-1 Trade Cas. (CCH), ¶ 62,514 at 76,985 (C.D. Cal. 1979) (allegation of distributorship termination following acquisition did not allege antitrust injury sufficient to confer standing).

> Although Peterson [the owner] undoubtedly suffered injuries as a result of GM's actions, his injuries were a derivative consequence of JPM's [the bankrupt distributor's] injuries. None of the injuries were inflicted directly on Peterson by GM's allegedly anticompetitive conduct. Instead, the injuries are a direct result of JPM's failure. Peterson's own explanation of his injuries shows that JPM was the target of GM's anticompetitive activity and that Peterson's injuries are simply an indirect result. In sum, Peterson's damage are incidental to the alleged antitrust activity and not the type of loss Congress intended to prevent with the antitrust laws.

Id. at 521. The Eighth Circuit concluded that, "[b]ecause Peterson has not shown he suffered an antitrust injury, he lacks federal antitrust standing." *Id.*[4]

In the instant case, both the District Court and the Court of Appeals recognized that petitioners, as the terminated distributors of Seven-Up Brooklyn following the Bankruptcy Court's approval of the DPSU/Honickman acquisition proposal, stand in exactly the same position as the plaintiffs in *A.G.S. Electronics* and *Lovett*. Even if respondents' conduct and Honickman's acquisition of the assets of Seven-Up Brooklyn violated the antitrust laws (which, as the FTC approval and the court approval of the stipulation in which that approval is embodied evidence, they did not), both the District Court and the Court of Appeals correctly held that petitioners' alleged injuries are not claimed -- and indeed

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[4] *See also Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1378 (7th Cir. 1987) ("derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury' sufficient to confer antitrust standing").

could not be claimed -- to flow from any *anticompetitive* effect of that alleged conduct. As such, petitioners' alleged injuries do not constitute the type of injuries the antitrust laws were intended to prevent. Accordingly, the District Court and the Court of Appeals properly found that petitioners lacked antitrust standing and dismissed petitioners' antitrust claims.

Petitioners also take issue with the Court of Appeals' "second ground for denying standing" -- that a vertically structured monopoly can take only one monopoly profit and that, if, as petitioners alleged, respondents had successfully conspired to monopolize the soft drink bottling market in the New York area, their sole incentive with respect to distribution would have been to select the cheapest method available, for which petitioners could compete to offer their services. (Petition at 20-23) Petitioners' challenge fails, however, for two reasons.

First, the Court of Appeals was correct when, citing *Lamoille Valley R.R. v. ICC*, 771 F.2d 295, 318 (D.C. Cir. 1983), and *Byars v. Bluff City News Co.*, 609 F.2d 843, 861 (6th Cir. 1979), it held that:

> [I]f [respondents] successfully conspired to monopolize soft drink bottling in the New York area, they could reap no additional gain from monopolizing the retail distribution of soft drinks. If a monopolist at the distribution level were to restrict output to maximize profit, the restriction would deprive the monopolist at the bottling level of its maximizing output and price. Once having achieved the alleged bottling monopoly, therefore, [respondents'] sole incentive is to select the cheapest method of distribution. The distributors are thus free to offer their services to [respondents], who have no incentive to reject the offer if it is more economical than use of their employees, and

> consumers of soft drinks will benefit from this competition.

(Petition App. 13) (citation omitted). Though petitioners criticize the Court of Appeals' reliance on economic theory, they do not identify any contrary legal precedent even to suggest that the economic theory relied upon is either flawed or inappropriate.

Second, and perhaps more important, petitioners' challenge of the Court of Appeals' "second ground for denying standing" does not in any way render erroneous the Court of Appeals' principal ground for denying standing. Whether or not the economic theory of the *Lamoille* and *Byars* cases applies to the instant case, the legal precedent relied upon by both lower courts and cited above consistently establishes that distributors that are terminated following, as petitioners have characterized it, "a horizontal acquisition by one bottler of another bottler's assets which was accomplished by the respondents' joint predatory conduct" (Petition at 20-21), simply do not have standing to challenge that acquisition on antitrust grounds.

Because the District Court and the Court of Appeals correctly held that petitioners lacked antitrust standing to pursue their antitrust claims, the petition for a writ of certiorari should be denied.

II.

THE DISTRICT COURT PROPERLY HELD THAT PETITIONERS' COMPLAINT WAS BARRED BY THE DOCTRINE OF *RES JUDICATA*

Although the Court of Appeals did not rely upon the doctrine of *res judicata* when it affirmed the District Court's dismissal of petitioners' complaint, the doctrine, and its proper application by the District Court, provides an additional independent basis for denying the petition for a writ of certiorari. The applicable precedent is clear that, having failed timely to appeal the Bankruptcy Court's order approving the sale of Seven-Up Brooklyn's assets to Honickman, petitioners are precluded from collaterally attacking that order in a subsequent lawsuit.

The District Court below rightly followed the sound reasoning of the Seventh Circuit in *In the Matter of Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989), in which the appellate court affirmed the dismissal of an action filed by the debtor's trustee sixteen months after the bankruptcy court had authorized the sale of certain of the debtor's assets. The trustee alleged that the debtor, the debtor's attorneys, the successful purchaser of the assets, the two secured creditors, and others had rigged the bidding at the judicial sale and engaged in a scheme to defraud the unsecured creditors in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, other statutes and Illinois common law. Holding that the trustee's suit was barred by the doctrine of *res judicata*, the appeals court wrote:

> No appeal [from the bankruptcy court's] order was taken . . . and after the time for appeal had lapsed, the order could not be attacked in a new lawsuit brought by a party to the sale proceeding or by a successor to that party or by any-

> one else so far identified with such a party as to be classified as being in privity with him; such a suit would be barred by res judicata. . . .
>
> The unsecured creditors who appeared at the two hearings before [the bankruptcy judge] and urged him first to allow bids for Met-L-Wood's assets to be solicited and then to approve Thompson's bid were parties to the sale proceeding. They are therefore barred by res judicata from bringing a lawsuit to nullify the sale. (Bringing the suit under RICO could make no difference. RICO is many things, but it is not an exception to res judicata.)

861 F.2d at 1016 (citation omitted).[5]

In the instant case, the District Court below recognized that petitioners, as unsecured creditors, appeared at the two hearings before Judge Goetz and, unlike the unsecured creditors in the *Met-L-Wood* case, actually raised the same issues of bid rigging and monopolization at the judicial sale hearing as they asserted in the

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[5] *See also In re Intl Nutronics, Inc.*, 28 F.3d 965, 969-71 (9th Cir. 1994) (bankruptcy court order approving sale of assets in bankruptcy precludes subsequent antitrust suit challenging acquisition under the doctrine of *res judicata*); *Sure Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869, 877 (2d Cir. 1991) (subsequent suit by debtor against lender barred by previous bankruptcy order approving sale of debtor's assets); *Hendrick v. Avent*, 891 F.2d 583, 587 (5th Cir.) ("collateral attacks [on bankruptcy court order approving sale of debtor's assets] brought later are barred by res judicata"), *cert. denied*, 498 U.S. 819 (1990); *Robinson v. First National City Bank*, 482 F. Supp. 92 (S.D.N.Y. 1979) (shareholder litigation against debtor's banks barred as to shareholders who appeared at the debtor's reorganization hearing); *Oliner v. McBride's Industries, Inc.*, 412 F. Supp. 490 (S.D.N.Y. 1975) (subsequent suit by bankruptcy trustee alleging fraud by purchaser of debtor's assets barred by bankruptcy court's order approving sale of debtor's assets).

complaint in the instant case. Having appeared at the Bankruptcy Court hearings in 1991 to object to the proposed sale to Honickman, indeed on the same grounds as those asserted in the complaint below, petitioners' *sole* recourse following the Bankruptcy Court's decision was to appeal the decision under 28 U.S.C. § 158(a) and (d), or to move to have the judgment vacated under Rule 60(b) of the Federal Rules of Civil Procedure. *In the Matter of Met-L-Wood Corp.*, 861 F.2d at 1016. Petitioners did neither. Two years later, however, petitioners were barred as a matter of law by the doctrine of *res judicata* from bringing a separate lawsuit challenging the sale.

Thus, for the additional independent reason that petitioners' complaint is barred by the doctrine of *res judicata*, the petition for a writ of certiorari should be denied.

III.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' STATE LAW CLAIMS FOR TORTIOUS INTERFERENCE

Both the District Court and the Court of Appeals properly held that petitioners' state law tort claims for tortious interference with present and prospective contractual relations should be dismissed for failure to state a claim for which relief could be granted. The Court of Appeals correctly concluded that, although all of petitioners' allegations assert that respondent Honickman's interest was to achieve a soft drink bottling monopoly, "[n]othing in the allegations may reasonably be read to suggest that the target of [respondents'] conduct was Seven-Up Brooklyn's contractual arrangements with [petitioners], any more than the target was Seven-Up Brooklyn's contracts with phone or electric companies." (Petition App. 14) Accordingly, the Court of Appeals rightly held

that the complaint failed to allege that respondents had the requisite intent with regard to procuring the breach of Seven-Up Brooklyn's contracts with petitioners.

Petitioners' effort to identify allegations to show respondents' intent proves the correctness of the Court of Appeals decision. Each of the allegations identified (Petition at 24-25) asserts respondents' intent to acquire the Seven-Up Brooklyn assets and to dissuade others from acquiring them, but they in no way even suggest that the target of respondents' conduct was petitioners' distributorship agreements with Seven-Up Brooklyn. Accordingly, the Court of Appeals decision is correct, and the petition for a writ of certiorari with regard to the intentional interference with contractual relations claim should be denied.

Moreover, although the Court of Appeals did not rely on this ground to affirm the dismissal of petitioners' interference with present contractual relations, the District Court properly dismissed that claim because, in light of the Bankruptcy Court's termination of Seven-Up Brooklyn's authority to use cash collateral at the urging of Seven-Up Brooklyn's secured creditors, which proximately caused Seven-Up Brooklyn to close its doors, thereby extinguishing petitioners' distributorships, petitioners had not and could not allege that Seven-Up Brooklyn would have performed its contracts with petitioners "but for" Honickman's alleged conduct. *See, e.g., Sharma v. Skaarup Ship Management Corp.*, 916 F.2d 820, 828 (2d Cir. 1990) (a plaintiff must allege that "there would not have been a breach but for the activities of defendants"), *cert. denied*, 499 U.S. 907 (1991); *Special Event Entertainment v. Rockefeller Center, Inc.*, 458 F. Supp. 72, 78 (S.D.N.Y. 1978) (same). Petitioners' inability to allege that respondents' conduct -- rather than the conduct of the Bankruptcy Court and Seven-Up Brooklyn's secured creditors -- proximately caused the breach of petitioners' contractual relations provides an additional independent basis to uphold the dismissal of the claim and to deny the petition for a writ of certiorari.

Finally, both the District Court and the Court of Appeals held that petitioners' claim for tortious interference with prospective contractual relations should be dismissed because petitioners did not -- and could not -- allege that respondents had taken any actions towards the retailers that had purportedly purchased Seven-Up Brooklyn soft drink products from appellants in the past. The decisions below are entirely consistent with the precedent that has held that, to state a valid claim for interference with prospective relations, a plaintiff must allege that the defendant took some action towards third parties that indeed interfered with business relations between the plaintiff and those third parties. *See, e.g., Marilyn Miglin, Inc. v. Gottex Industries, Inc.*, 790 F. Supp. 1245, 1254 (S.D.N.Y. 1992) (dismissing tortious interference with prospective business relationships claim where plaintiff "alleges no actions taken towards third parties by [the defendant]"). Indeed, petitioners do not even raise the dismissal of their interference with prospective contractual relations as a ground for review and thus, by omission, appear to concede the correctness of this result.

CONCLUSION

This case is in no way unique and the decisions rendered by the District Court and the Court of Appeals in this case are entirely consistent with a large body of case law in the areas of antitrust standing, *res judicata* and tortious interference with present and prospective contractual relations. Petitioners have shown no conflict between the Court of Appeals decision and any decision of any other state or federal court, including this Court. In sum, there is absolutely no special or important reason for this Court to exercise its discretion to review this matter. The Court of Appeals properly affirmed the dismissal of petitioners' complaint in this case, and this Court should deny the petition for a writ of certiorari.

Dated: September 29, 1995

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APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 158(a)

The district courts of the United States shall have jurisdiction to hear appeals.

(1) from final judgments, orders, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of the court, from other interlocutory orders and decrees;

and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 158(d)

The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

Fed. R. Civ. P. 60(b)

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.